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BOARD OF EDUCATION OF TECUMSEH PUBLIC SCHOOL DISTRICT, Independent School District No. 92 of Pottawatomie County, and TECUMSEH PUBLIC SCHOOL DISTRICT, Independent School District No. 92 of Pottawatomie County,

v.

LINDSAY EARLS AND LACY EARLS, minors, by their next friends and parents, John David and Lori Earls, and

DANIEL JAMES, by his next friend and mother, Leta Hagar

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF OF AMICI CURIAE NATIONAL SCHOOL BOARDS ASSOCIATION, ET AL., IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICI*[1]

The National School Boards Association (hereinafter "NSBA"), founded in 1940, is a not-for-profit federation of state associations of school boards across the United States, together with the school boards of the District of Columbia, Guam, and the U.S. Virgin Islands. NSBA represents the nation's 95,000 school board members, who, in turn, govern the nation's 14,722 local school districts.

NSBA has a history of active concern in the area of drug-free schools. NSBA filed as *amicus* in this Court in *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) and *Vernonia School District 47J v. Acton*, 515 U.S. 646 (1995). The NSBA Beliefs & Policies, which guide the association's actions, contain a strong statement regarding drug abuse in our nation's public schools.

> ***NSBA supports expanding efforts to address and prevent the problems raised by the use and abuse of ... drugs. NSBA supports efforts to ensure that schools and school-related activities are free from alcohol, tobacco and the aforementioned substances.***

The state school board associations of Colorado, Indiana, New Mexico, Oklahoma, Texas, and Wyoming join the NSBA. The state associations represent all or nearly all of the local public school boards in their respective states. In addition, NSBA is joined by the Texas Association of School Boards ("TASB") Legal Assistance Fund, which is composed of nearly 750 Texas school districts. The TASB Legal Assistance Fund is governed by three organizations: the Texas Association of School Boards, the Texas Association of School Administrators, and the Texas Council of School Attorneys.

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[1] The Amici file this brief with the consent of all parties. No counsel for a party authored this brief in whole or in part. No person or entity, other than the Amici, their members or their counsel made a monetary contribution for the preparation or submission of this brief.

Penn-Harris-Madison School Corporation is a public school district in northern Indiana, enrolling over 9,000 students. The district was party in the suit, *Joy v. Penn-Harris-Madison Sch. Corp.*, 212 F.3d 1052 (7th Cir. 2000).

Joining with this group of educators is W.A. Drew Edmondson, as Attorney General of the State of Oklahoma. The Office of the Attorney General has an active interest in combating juvenile drug use.

The issues of drugs in the schools and maintaining a safe environment for students are of major concern to school districts and law enforcement officials throughout the country.

SUMMARY OF THE ARGUMENT

Drugs are one of the most serious problems facing the American public school system today. Where traditional methods of anti-drug education have failed to stop the proliferation of drugs in the schools, many school boards have turned to programs of random, suspicionless drug testing in reliance on this Court's decision in *Vernonia School District 47J v. Acton*, 515 U.S. 646 (1995).

The decision of the *Earls* majority below unnecessarily restricts the availability of random, suspicionless drug testing under *Vernonia* in two ways. First, the *Earls* majority gave little weight to the fact that the Tecumseh school board ("Tecumseh") sought only to test students who volunteered to participate in extracurricular activities. The courts that have approved student drug testing policies, including this Court in *Vernonia*, have all made it clear that the voluntary nature of the activities in question greatly reduced the privacy interests of the students involved. The fact that *Vernonia* only dealt with student athletes was not dispositive to that decision.

Second, by requiring the school district to present evidence of serious drug use among the specific student groups to be tested, the *Earls* majority usurped the school board's responsibility for managing the school district and imposed a requirement at odds

with the stated goal of deterrence. While the "epidemic" of drug use found in *Vernonia* was a factor to be weighed against the students' privacy interests, it was not a determinative requirement.

ARGUMENT

I. Eliminating drug use in the American public schools presents one of the greatest challenges of the twenty-first century.

The plague of illicit drug use which currently threatens our nation's schools adds a major dimension to the difficulties the schools face in fulfilling their purpose - the education of our children. If the schools are to survive and prosper, school administrators must have reasonable means at their disposal to deter conduct which substantially disrupts the school environment.[2] As we enter the twenty-first century, American public schools are no longer expected merely to teach reading, writing, and arithmetic. Schools are now required to provide instruction in subjects as diverse as health education, sex education, and morality. Public schools are also being asked to shoulder the burden of feeding students breakfast and lunch, offering before and after school child care services, and providing medical and psychological services.

The changing role of the American public schools reflects the changes in our society in general. As society is impacted by the plagues of drugs and violence, so too are the schools and the educational environment. For at least the past twenty years, the United States has publicly committed itself to the *War Against Drugs*. One of the eight National Education Goals passed by Congress in 1994 was that: "By the year 2000, every school in the United States will be free of drugs, violence, and the unauthorized presence of firearms and alcohol and will offer a disciplined environment conducive to learning."[3] The Safe Schools Act of

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[2] *Schaill v. Tippecanoe County Sch. Corp.*, 864 F2d 1309, 1324 (7th Cir. 1988).

[3] 20 U.S.C.A.§5812(7)(A) (West 2001).

1994[4] was passed in part to help schools achieve their drug-free goal. It is within this context that schools must also ensure that the environment within their buildings is safe and conducive to learning.

A significant element in providing a safe and effective learning environment is the elimination of drugs and violence on school property and the deterrence of drug use among the student population. One of the most troubling problems with which public schools have had to contend in recent years has been the increase in the availability of drugs at school, the use of drugs by students, and the number of violent acts committed at school. According to a recent survey, 65.3 percent of students aged 12 through 19 reported that drugs were available at school.[5] That same survey noted that 14.6 percent of the student population reported they had been victimized at school. Several other studies have tracked illicit drug use by students in grades 8 through 12 and have concluded that drug use by students continues to be a problem. The *1998 National Education Goals Panel Report* showed that 40 percent of 10th graders used illicit drugs in 1997; which was up from 24 percent in 1991.[6] For the year 2000 the University of Michigan reported that 53.9 percent of high school seniors had used an illicit drug by the time they reached their senior year of high school.[7]

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[4]20 U.S.C.A.§5961(b) (West 2001).

[5]*Students' Report of School Crime: 1989 and 1995*, U.S. Department of Justice, Bureau of Justice Statistics, School Crime Supplement to the National Crime Victimization Survey, Spring 1989 and 1995.

[6]*National Indicator #20, National Education Goals Panel Report*, The National Education Goals Panel, http://www.negp.gov/98info/chap2/webpg410.html#ind20 (1998).

[7]*High School Youth Trends, 2001 Monitoring the Future Study*, National Institute on Drug Abuse, http://www.drugabuse.gov/Infofax/HSYouthtrends.html, December 21, 2001.

As stated by the Director of the National Institute on Drug Abuse, "Since 1991 drug use has been increasing among America's youth. To counter these trends, we must strengthen drug abuse prevention efforts at the Federal, State, and local levels."[8] The National Center for Educational Statistics reports the following:

- [A]fter reaching its lowest point in the early 1990s, drug use at any time during the previous year by high school seniors began to increase again for most drugs. For example, the percentage of seniors who reported using marijuana at any time during the previous year increased from 22 percent in 1992 to 38 percent in 1998.

- Between 1991 and 1998, the percentage of 8th, 10th, and 12th graders who reported using marijuana, smoking cigarettes, or using any illicit drug other than marijuana in the previous 30 days increased.

- In 1998, more 8th, 10th, and 12th graders reported that it would be "fairly easy" or very easy to obtain marijuana than did their counterparts in 1992.[9]

Other reports relate that 40.9 percent of high school seniors and 36.4 percent of high school sophomores indicate they used illegal drugs in the previous year.[10] One third of the nation's secondary

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[8]National Institute on Drug Abuse, National Institutes of Health, *Preventing Drug Use among Children and Adolescents: A Research Based Guide* (1997).

[9]National Center for Educational Statistics, http://nces.ed.gov/pubs99/condition99/indicator-27.html (last visited Dec. 20, 2001).

[10]http://www.publicagenda.org/issues/factfiles_detail.cfm?issue_type= llegal_drugs&list=5 (last visited Dec. 20, 2001).

students reported they had been offered, sold, or given an illegal drug on school property.[11]

Drug use affects a student's mind and body. This Court has already recognized that "[s]chool years are the time when the physical, psychological, and addictive effects of drugs are most severe."[12] Additionally, studies also show that some discipline problems in school, such as fighting, truancy, and vandalism, correlate with student use of alcohol and other drugs.[13] This correlation was evident in *Vernonia School District 47J v. Acton*,[14] this Court's leading case involving student drug use, where administrators and teachers reported a direct correlation between rising drug use and the number of disciplinary referrals, which had doubled since the early 1980s.[15] Finally, students impaired by drugs not only affect their own learning but disrupt the learning of others and the overall educational environment. This Court has noted that the effects of a drug-infested school "are visited not just upon the users, but upon the entire student body and faculty, as the educational process is disrupted."[16]

While schools have taught health education for many years and have been given federal dollars for drug education programming, studies indicate that classroom instruction is simply not enough. Even the district court in *Vernonia* noted that "[s]imply telling [students] that drug use is bad for their health and that they should

[11]Laura Kann, Ph.D., et al., *Youth Risk Behavior Surveillance–National Alternative High School Youth Risk Behavior Survey*, Centers for Disease Control and Prevention (1998).

[12]*Vernonia*, 515 U.S. 646, 661 (1995).

[13]*See e.g.* B. Bowman, *Aggressive and Violent Students; Statistics on Violence*, Developmental Resources, Inc. (1994).

[14]515 U.S. 646 (1995).

[15]*Id.* at 648-649.

[16]*Id.* at 661.

stop using is invariably ineffective."[17] As a consequence, many school boards have had to turn to other methods of curbing drug use. One of the most effective methods is the deterrent effect of random drug-testing. The policy adopted by Tecumseh is typical of the policies adopted by school districts across the nation in the wake of this Court's *Vernonia* decision. Such policies are designed to identify and help students who are using drugs, and to protect other students from the disruption and dangers posed by students using illegal drugs. They are not designed to be punitive. Under the Tecumseh policy, if a student tests positive the student is not disciplined or punished academically; instead, the student and the student's parent are offered help, such as a student assistance program or a drug rehabilitation program.[18] The Tecumseh school board has undertaken its responsibility in "furtherance of [its] responsibilities, under a public school system, as guardian and tutor of children entrusted to its care."[19]

In 1995, this Court offered public schools a potent weapon in their fight against drug use by students. In *Vernonia School District 47J v. Acton*,[20] the Court allowed a school district to randomly and without individualized suspicion test the school's student athletes for drug use. Drug tests are searches governed by the Fourth Amendment,[21] and the *Vernonia* decision was grounded in this Court's earlier landmark school search case, *New Jersey v. T.L.O.*[22]

[17]*Acton v. Vernonia School District 47J*, 796 F.Supp. 1354, 1357 (D.Or. 1992), *rev'd*, 23F.3d 1514 (9th Cir. 1994), *vacated by* 515 U.S. 646, *remanded to* 66 F.3d 217 (9th Cir. 1995).

[18]*Earls v. Board of Education of Tecumseh Public Sch. Dist.*, 115 F.Supp.2d 1281, 1291 n.40 (W.D. Okl. 2000).

[19]*Vernonia*, 515 U.S. at 665.

[20]515 U.S. 646 (1995).

[21]*See id.* at 652; *see also Treasury Employees v. Von Raab*, 489 U.S. 656, 665 (1989).

[22]469 U.S. 325 (1985).

In *T.L.O.*, this Court recognized the public school setting presents special circumstances that demand accommodations of the usual Fourth Amendment requirements.[23] The *T.L.O.* Court concluded that instead of requiring "probable cause" to justify a search, school officials need only meet the lower "reasonable suspicion" standard.[24] After reviewing *T.L.O.* and other cases dealing with the limited nature of student rights in the public schools, the *Vernonia* Court concluded that "while children assuredly do not shed their constitutional rights ... at the schoolhouse gate, the nature of those rights is what is appropriate for children in school."[25]

Since *Vernonia*, courts across the nation have split on the question of what factors made the random drug testing program in *Vernonia* constitutional. Specifically, two major questions have arisen:

1) Is *Vernonia* limited to students participating in athletics, or may schools test students who join other voluntary, extracurricular activities?

2) What evidence must a school district present of current drug use to justify random, suspicionless drug testing?

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[23]*Id.* at 337-40; "Fourth Amendment rights . . . are different in public schools than elsewhere, the "reasonableness" inquiry cannot disregard the schools' custodial and tutelary responsibility for children" *Vernonia*, 515 U.S. at 656.

[24]*T.L.O.*, 469 U.S. at 341.

[25]*Vernonia*, 515 U.S. at 655-56 (internal citations omitted); *see also Florida v. J.L.*, 529 U.S. 266 (2000) in striking down a *Terry* "stop and frisk" search based upon an anonymous tip, the Court noted that "[n]or do we hold that public safety officials in quarters where the reasonable expectation of Fourth Amendment privacy is diminished, such as airports and *schools*, cannot conduct protective searches on the basis of information insufficient to justify searches elsewhere."(emphasis added) *Id.* at 274.

Until the Tenth Circuit's decision below,[26] the Courts of Appeals appeared to agree that school districts could require students participating in non-athletic extracurricular activities to undergo random, suspicionless drug testing, without proving epidemic drug use among the narrow groups of students to be tested.[27] *Earls* is the only federal appellate court to interpret *Vernonia* as allowing random drug screenings only for students engaged in interscholastic athletic competition. The analysis in *Vernonia* warrants a broader interpretation than the one provided by the Tenth Circuit.[28] *Amici* believe the majority essentially

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[26]*Earls v. Board of Education of Tecumseh Public School District*, 242 F.3d 1264 (10th Cir. 2001).

[27]*See, e.g., Schaill v. Tippecanoe County Sch. Corp.*, 864 F2d 1309 (7th Cir. 1988); *Todd v. Rush County Schs.*, 133 F.3d 984 (7th Cir. 1998); *Miller v. Wilkes*, 172 F.3d 574 (8th Cir. 1999), *vacated as moot*, 172 F.3d 582 (June 15, 1999). *Joy v. Penn-Harris Madison Sch. Corp.*, 212 F.3d 1052 (7th Cir. 2000). Although the Tenth Circuit below noted that the Seventh Circuit struck down a student drug testing policy in *Willis v. Anderson Comm. Sch. Corp.*, 158 F.3d 415 (7th Cir. 1998), the policy in *Willis* required drug testing for all students who had been suspended for three days, regardless of the reason, as a condition of returning to school. *Id.* at 417. Failure to comply with the testing or failure to participate in a drug education program could result in additional punishment, including expulsion. *Id.* As such, *Willis* involved the exact situation that Justice Ginsburg noted was *not* at issue in *Vernonia*. *Vernonia*, 515 U.S. at 666 (Ginsburg, J., concurring). In light of the importance placed on the voluntary nature of the extracurricular activities at issue by the courts in cases like *Vernonia*, *Todd*, and *Miller*, and by the school district in this case, *Willis* is simply inapplicable to the issues at hand.

[28]*See, e.g.*, James M. McCray, *Urine Trouble: Extending Constitutionality to Mandatory Suspicionless Drug Testing of Students in Extracurricular Activities*, 53 Vand. L. Rev. 387 (2000); Joanna Raby, *Reclaiming Our Public Schools: A Proposal for School-Wide Drug Testing*, 21 Cardozo L. Rev. 999 (1999); Andrew P. Massmann, *Drug Testing High School and Junior High School Students After Vernonia School District 47J v. Acton: Proposed Guidelines for School Districts*, 31 Val. U. L. Rev. 721 (1997); Jacqueline A. Stefkovich, *Drug Testing of Students in Public School: Implications of Vernonia School District v. Acton for Other Types of School-Related Drug Searches*, 113 Ed. Law Rep. 521 (1996).

articulated the standards for analyzing the constitutionality of Tecumseh's policy, but failed to follow those articulated standards.[29] Specifically, *Amici* believe the *Earls* majority gave too little weight to the voluntary nature of the activities in question, and too much weight to the alleged drug "epidemic" alleged to have existed in *Vernonia*.

II. Supreme Court precedent should not be so narrowly interpreted as to exclude testing students who voluntarily participate in non-athletic extracurricular activities.

In its majority opinion below, the Tenth Circuit appeared to fear that Tecumseh's policy was merely a prelude to testing every public school student as a prerequisite for attending school.[30] Such fears are completely unfounded; while it is true that Tecumseh's policy goes further than the policy approved by this Court in *Vernonia*, in that it would apply to students who voluntarily participate in non-athletic extracurricular activities, it does not reach the question specifically reserved by Justice Ginsberg in her concurring opinion in *Vernonia*, *i.e.* whether a school can test "all students required to attend school."[31] As will be shown below, the voluntary nature of the extracurricular activities subject to testing has been a critical component of all approved policies.

This Court has repeatedly held that a suspicionless search unsupported by either probable cause or a warrant is justified by the existence of "special needs, beyond the normal need for law

[29] "I diverge with the majority only where, once again, I believe it has not actually followed the articulated conclusions and standards it has set forth for itself." *Earls*, 242 F.3d at 1283 (Ebel, J., dissenting).

[30] "Without any limitation, schools could test all of their students simply as a condition of attending school." *Earls*, 242 F.3d at 1278.

[31] *Vernonia*, 515 U.S. at 666 (Ginsburg, J., concurring).

enforcement...."[32] In *T.L.O.*, this Court concluded that public schools meet the "special needs" requirement in general, without any need to examine the factual circumstances of the specific school in question.[33] In *Vernonia*, the Court confirmed that like in the federal customs industry (*Von Raab*) and the railroad industry (*Skinner*), "[w]e have found such 'special needs' to exist in the public schools context."[34] In determining that "special needs" existed, the *Vernonia* Court did not consider the specific factual evidence of a drug problem in the Vernonia schools; that evidence was only considered later, as part of the subsequent balancing test.[35]

[32] *Vernonia*, 515 U.S. at 653 (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987)).

[33] *See T.L.O.*, 469 U.S. at 340-41.

[34] *Vernonia*, 515 U.S. at 653. In neither *Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602 (1989), nor *Treasury Employees v. Von Raab*, 489 U.S. 656, 665 (1989) did the Supreme Court rely on evidence of a drug problem in the *specific group* to be tested. *Skinner* upheld a program of suspicionless drug-testing in the railroad industry based on evidence of a drug problem in the industry nationwide, without any evidence that the specific railroad in question had a similar problem, *see Skinner*, 489 U.S. at 607; and *Von Raab* approved the suspicionless drug-testing of customs officials without any evidence of a drug problem in the industry. *Von Raab*, 489 U.S. at 673. *See also Miller v. Wilkes*, 172 F.3d 574, 578 (8th Cir. 1999) "The Supreme Court has held that the public school environment provides the requisite 'special needs' so that a school district may dispense with those Fourth Amendment protections." The fact that *Miller* was vacated on the grounds of mootness does not diminish its status as persuasive authority in this case. The Eighth Circuit's decision to vacate the opinion as moot was made based on the fact that all the students bringing the legal challenge in that case had graduated by the time the rehearing occurred. *Miller*, 172 F.3d at 582.

[35] *Vernonia*, 515 U.S. at 662-663; *see also Chandler v. Miller*, 520 U.S. 305 (1997) (noting that a demonstrated problem of drug abuse is "not in all cases necessary to the validity of a testing regime." *Id.* at 319.

This Court has cautioned that "[a]s the text of the Fourth Amendment indicates, the ultimate measure of the constitutionality of a governmental search is 'reasonableness'."[36] The reasonableness of a given search is judged by use of a balancing test:

> The permissibility of a particular practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate, governmental interests.[37]

In *Vernonia*, this Court identified three factors to consider in balancing the parties' respective interests:

1. the nature of the privacy interest upon which the search intrudes;
2. the character of the intrusion;[38]
3. the nature and immediacy of the governmental concern at issue, and the efficacy of the chosen means for meeting it.[39]

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[36]*Vernonia*, 515 U.S. at 652.

[37]*Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602, 619 (1989); *see also Miller*, 172 F.3d at 578.

[38]The second *Vernonia* factor " the character of the intrusion complained of " does not appear to be at issue in this appeal. The Tecumseh policy is virtually identical to that approved of by this Court in *Vernonia*. The Court found that requiring a student to produce a urine sample with either minimal direct observation (for male students) or no direct observation (for female students) duplicates the conditions anyone using a public restroom must face. The Court therefore ruled that the intrusion on a student's privacy interests in obtaining the urine sample was "negligible." *Id.* at 658. Even the *Earls* majority court conceded that the Tecumseh policy did not constitute a significant invasion of a student's privacy. *Earls*, 242 F.3d at 1276.

[39]*Vernonia*, 515 U.S. at 654-660.

In considering the nature of a student's privacy interest in the context of drug testing, this Court stated that "[c]entral, in our view, to the present case is the fact that the subjects of the Policy are (1) children, who (2) have been committed to the temporary custody of the State as schoolmaster."[40] This Court emphasized that the nature of a school district's power over schoolchildren "is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults."[41]

As discussed above, the major difference between *Vernonia* and the Tecumseh policy is the greater inclusiveness of the Tecumseh policy, *i.e.* it covers all students participating in extracurricular activities, as opposed to limiting the program to student athletes. However, in *Todd* the Seventh Circuit held that this difference did not render a student drug testing program unconstitutional:

> [W]e find that the reasoning compelling drug testing of athletes also applies to testing of students involved in extracurricular activities. Certainly successful extracurricular activities require healthy students.[42]

While it is true that *Vernonia* noted that student athletes have a lower expectation of privacy due to the circumstances in which they change before and after sporting events, this "locker room" argument was *not* intended to suggest that non-athlete students

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[40]*Id.* at 654.

[41]*Id.* at 655.

[42]*Todd*, 133 F.3d at 986; *see also Miller*, 172 F.3d at 578-79 ("Pathe argues that the fact that the policy in *Vernonia* applied only to student athletes was more significant to the Supreme Court in reaching its decision than was the fact that the policy applied to students who were attending public school. We read the case differently.").

have an adult citizen's full expectation of privacy.[43] To the contrary, *Vernonia* prefaced the "locker room" discussion by noting that *all* students are "routinely required to submit to various physical examinations and to be vaccinated against various diseases,"[44] and that because of these medical examinations, "students within the school environment have a lesser expectation of privacy than members of the population generally."[45] This Court discussed at some length the reduced constitutional rights of *all* public schools students, noting that "for many purposes, school authorities ac[t] *in loco parentis*."[46]

With respect to the non-athlete students participating in extracurricular activities in Tecumseh, the district court noted that there was evidence in the record that such students traveled out of town and out of state more frequently than the general student population, sometimes sleeping together in a dormitory setting, sharing motel rooms, or sharing communal restroom facilities.[47] Even the *Earls* majority eventually conceded that "like athletes, participants in other extracurricular activities have a somewhat lesser privacy expectation than other students."[48] For the purpose of the *Vernonia* balancing test, therefore, *all* students participating

[43] "The Court did say that '[l]egitimate privacy expectations are even less with regard to student athletes.' That is not to say, however, that it is only the student who seeks to engage in extracurricular school sports activities whose legitimate expectation of privacy is so diminished that a search such as this one can stand up to constitutional scrutiny." *Miller*, 172 F.3d at 579.

[44] *Vernonia*, 515 U.S. at 656.

[45] *Id.* at 657 (quoting *T.L.O.*, 469 U.S. at 348) (Powell, J., concurring).

[46] *Id.* at 655 (citing *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 684 (1986)).

[47] *Earls v. Board of Education of Tecumseh Public Sch. Dist.*, 115 F.Supp.2d 1281, 1290 n.34 (W.D. Okl. 2000).

[48] *Earls*, 242 F.3d at 1276.

in extracurricular activities have a lower expectation of privacy than the already reduced expectation of students in general.

Vernonia also stressed that another factor reducing the privacy expectations of student athletes is the voluntary nature of student athletics; that because a student chooses to "go out for the team," he or she "ha[s] reason to expect intrusions upon normal rights and privileges, including privacy."[49] This argument is true of all students who participate in extracurricular activities and was given short shift by the *Earls* majority. The Seventh Circuit has twice found that the voluntary nature of extracurricular activities justifies drug testing *all* students participating in extracurricular activities, due to their reduced privacy interests.[50] Any student who elects to participate in an extracurricular activity voluntarily agrees to accept additional responsibilities,[51] including participating in a drug testing program. Participation in extracurricular activities is a privilege, not a right[52] school districts are not obligated to offer

[49] *Vernonia*, 515 U.S. at 657.

[50] *See Todd*, 133 F.3d at 986; *Schaill*, 864 F2d at 1319.

[51] Students participating in extracurricular activities face additional admission requirements, *Earls*, 115 F.Supp.2d at 1289-90; and students can be removed from participation for different and often more strict disciplinary regulations, *see Todd*, 133 F.3d at 986; *Albach v. Odle*, 531 F.2d 983, 984-85 (10th Cir. 1976), and with less formal due process procedures. *Pegram v. Nelson*, 469 F.Supp. 1134, 1142 (D.N.C. 1979); *Goss v. Lopez*, 419 U.S. 565, 578 (1974).

[52] *Todd v. Rush County Schools*, 133 F.3d 984, 986 (7th Cir. 1998); *see also Poling v. Murphy*, 872 F.2d 757, 764 (6th Cir. 1989) (no protected right to participate in student council elections); *Niles v. Univ. Interscholastic League*, 715 F.2d 1027, 1029 (5th Cir. 1983); *Farver v. Board of Education of Carroll County*, 40 F.Supp.2d 323 (D.Md. 1999); *McFarlin v. Newport Special School District*, 784 F. Supp. 589, 592-93 (E.D. Ark. 1992); *Palmer v. Merluzzi*, 689 F.Supp. 400 (D.N.J. 1988); *Spring Branch Indep. Sch. Dist. v. Stamos*, 695 S.W.2d 556, 561 (Tex. 1985) ("students do not possess a constitutionally protected interest in their participation in extracurricular activities."); *Ferguson v. Phoenix-Talent School Dist.*, P.3d 943 (Or. App. 2001).

extracurricular activities. This Court should not consider the fact that the target students of the Vernonia program were athletes, as opposed to participants in any other extracurricular activity, dispositive.

By essentially ignoring the voluntary nature of the non-athletic extracurricular activities at issue below, the *Earls* majority contradicts this Court's "special needs" analysis:

> An essential, distinguishing feature of the special needs cases is that the person searched has consented, though the usual voluntariness analysis is altered because adverse consequences, (e.g. dismissal from employment or disqualification from playing on a high school sports team), will follow from refusal. The person searched has given consent, as defined to take into account that the consent was not voluntary in the full sense of the word.[53]

Our nation has daily reminders that in some situations certain privileges are conditioned on additional constraints and intrusions -- we submit to screening when we fly on a commercial aircraft or enter a government building. As Judge Friendly has noted, passengers who do not want to be searched at airports can avoid such searches by voluntarily choosing not to travel by air.[54] Likewise, students who do not wish to be drug tested can avoid such testing by voluntarily choosing not to participate in extracurricular activities.

The Tenth Circuit suggests the need for the distinction between athletes and students participating in other extracurricular activities, because "[w]ithout any limitation, schools could test all of their students simply as a condition of attending school."[55] This

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[53] *Ferguson v. City of Charleston*, 121 S.Ct. 1281, 1295 (2001) (Kennedy, J., concurring).

[54] *United States v. Edwards*, 498 F.2d 496, 500 (2d Cir. 1974).

[55] *Earls*, 242 F.3d at 1278.

ignores, however, the critical distinction between using drug screening as a precondition to public education, and using drug screening as a precondition to participation in voluntary extracurricular activities. In her concurrence in *Vernonia*, Justice Ginsburg noted that the majority opinion was limited to students who voluntarily participate in interscholastic athletics and would not necessarily extend to all students who attend public schools.[56] Tecumseh is *not* asking its students to surrender their state constitutional right to access a public education, but is conditioning the participation in extracurricular activities -- which is a privilege, not a right -- on that concession. If students wish to exercise their privilege to participate, they must abide by a higher standard of conduct, and surrender themselves to greater scrutiny than students in the general attendance.

III. *Vernonia* should not be narrowly interpreted to impose what is remarkably similar to an individualized suspicion requirement before allowing schools to enact measures designed to prevent and deter student drug use.

The *Earls* majority's greatest problem with the Tecumseh policy stemmed from the application of the third *Vernonia* factor - the nature and immediacy of the governmental concern, and the efficacy of the chosen means for meeting it. In essence, the *Earls* majority determined that Tecumseh had not produced enough evidence to show that it suffered from the sort of "drug rebellion" of "epidemic proportions" that supposedly existed in Vernonia.[57] The difficult question facing this Court, then, is when may schools implement drug testing policies in situations that are not "rebellions" and "epidemics"? This Court has previously approved of random, suspicionless drug testing in the railroad industry based on evidence of a drug problem in the industry nationwide, without any evidence that the specific railroad in question had a similar

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[56] *Vernonia*, 515 U.S. at 666 (Ginsburg, J. concurring).

[57] *See id.* at 662-63.

problem,[58] and in the customs industry without any evidence of a drug problem in the industry.[59] Even the *Earls* majority backtracked towards the end of its opinion and acknowledged that a "drug epidemic" is not required before testing may begin:

> We do not suggest that a school must wait until it can identify a drug abuse problem of epidemic proportions before it may drug test groups of its students. Nor do we declare any bright line mark concerning the magnitude at which a drug problem becomes severe enough to warrant a suspicionless drug testing policy. We leave that to each school district.[60]

So where should the line be drawn?

Amici believe that it should be drawn well short of the standard suggested by the *Earls* majority, which would require schools to "demonstrate that there is some identifiable drug abuse problem among a sufficient number of those subject to the testing, such that testing that group of students will actually redress its drug problem."[61] As Judge Ebel perceptively noted, this test conflicts with *Vernonia* because it would essentially reimpose the "special needs" requirement at the end of the analysis by requiring the school district to show that its policy was adopted in response to a "documented drug abuse problem," which the *Earls* majority had previously determined was a major component of the "special needs" analysis.[62]

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[58] *Skinner*, 489 U.S. at 607.

[59] *Von Raab*, 489 U.S. at 673.

[60] *Earls*, 242 F.3d at 1278.

[61] *Id.*

[62] *Id.* at 1281-83 (Ebel, J., dissenting). This argument also contradicts the majority's initial concession that *Vernonia* stood for the proposition that the public schools meet the "special needs" requirement in general, without the need to show a particular drug problem. *See Earls*, 242 F.3d at 1270; "I agree with the majority that, under *Vernonia* ... a public school district need not demonstrate a particularized 'special need' to randomly test students engaged in extracurricular activities for illegal drug use." *Id.* at 1279 (Ebel, J., dissenting).

The high level of evidence of documented drug use by the specific groups of students to be tested required by the *Earls* majority ignores the fact that this is a *balancing* test. As Judge Ebel notes in his dissenting opinion, "the majority appears to forget its earlier conclusion that there is just not much for the school district's interests to be weighed against."[63] If the privacy interests of students participating in extracurricular activities are truly diminished and the intrusion of their privacy is "not significant,"[64] then under the balancing test called for in *Vernonia* and similar cases, the balance would tip in favor of the student plaintiffs only if the interests of the school district were "truly insignificant."[65] However, in *Vernonia* this Court noted that deterring drug use among our nation's students is "important, perhaps compelling."[66] How can such a balance be said to tip in favor of the students, considering what weights are placed on each side of the scales? It is clear that the *Earls* majority treated the *Vernonia* factors not as issues to be balanced against each other, bur rather as three distinct elements, each of which the school district was required to separately establish. By doing so, the Tenth Circuit essentially re-imagined the "individualized suspicion" requirement as a sort of "associational suspicion" requirement. As this Court has noted with regards to the individualized suspicion of wrongdoing, however, "the Fourth Amendment imposes no irreducible requirement of such suspicion."[67]

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[63] *Earls*, 242 F.3d at 1283 (Ebel, J., dissenting).

[64] *Id.* at 1276.

[65] *Id.* at 1283 (Ebel, J., dissenting).

[66] *Vernonia*, 515 U.S. at 661.

[67] *T.L.O.*, 469 U.S. at 342 n.8 (quoting *United States v. Martinez-Fuerte*, 428 U.S. 543, 560-61 (1976)); *see also Indianapolis v. Edmond*, 531 U.S. 32, 37 (2000) (holding that individualized suspicion "is not an irreducible component of reasonableness").

Amici respectfully submit that requiring schools to present evidence of documented drug use among each subcategory of students they wish to test, as was required below, is both unworkable and inconsistent with *Vernonia*, *Skinner*, and *Von Raab*. The problem with direct evidence is that it is not particularly useful; by the time a student dies of a drug overdose from drugs received at school, it is too late for the school to do anything to help him.[68] By the time the district court considered the situation in *Vernonia*, the student body was apparently in a "state of rebellion." The more logical approach to this problem has been taken by courts such as the Eighth Circuit, which has noted that, "It is in the public interest to endeavor to avert the potential for damage, both to students who abuse and to those students, teachers, family members, and others who are collaterally affected by the abuse, before the problem gains a foothold."[69]

Because of the nature of drug use, it is rare that schools can prove it directly. Instead, most schools discover that they have drug problems based upon student self-confessed drug use revealed during annual surveys. Just as the University of Michigan conducts annual statistical surveys on student drug use on a national basis for the *Monitoring the Future Study*, so too, most states conduct statewide and districtwide surveys. Thus, for example, in *Joy v. Penn-Harris-Madison School Corporation*, the court had before it extensive evidence that the school had a very serious drug problem, with students being above the national and state averages in most categories of drug use.[70] However, self-

[68]*See, e.g., Linke v. Northwestern School Corpotation*, 734 N.E.2d 252 (Ind.App.), *on reh'g, transfer granted, opinion vacated in 58(a)* (2001).

[69]*Miller v. Wilkes*, 172 F.3d 574, 576 (8th Cir. 1999); *see also Knox County Education Association v. Knox County Board of Education*, 158 F.3d 361 (6th Cir. 1998)(holding that there need not be proof of a "pronounced" drug problem among teachers in a school before the school can constitutionally implement a drug testing program for safety-sensitive employees).

[70]212 F.3d 1052 at 1064-1065 (7th Cir. 2000).

reporting surveys cannot provide the associational or "group-specific" evidence required by the *Earls* court, because as survey questions require more self-identification by students (such as groups to which they might belong), the students' answers are likely to become less truthful due to the fear of disclosure. Most self-report surveys, therefore, are designed to test the student body as a whole, and not specific elements of the student body.

Thus schools are caught in a bind. Many schools have statistical evidence demonstrating a significant drug problem among the student body as a whole, usually paired with some anecdotal evidence of drug use. But the *Earls* court says that this is not enough: there must instead be specific evidence of drug use in the targeted categories. Must schools wait for students to die, as in *Linke*, or is it sufficient to show a more general drug problem? And how should the relevant groups be defined? If there is solid evidence of a drug problem in the marching band, but anecdotal evidence points to the brass section as the troublemakers, can the school drug test the woodwinds? *Amici* respectfully submit that in balancing the *Vernonia* factors, the courts should focus on the evidence of a drug problem in the general student population (*i.e.* usage rates above state and national averages, or direct evidence), and not on the evidence of drug use by specific subgroups of students.

Although the *Earls* majority promised to leave the determination of whether a school district had a severe enough drug problem to justify testing "to each school district,"[71] it is clear they did not do so in this case: the Tecumseh policy was overturned precisely because two judges on the Tenth Circuit disagreed with the elected Tecumseh school board as to the severity of its own drug problem. The *Earls* majority correctly stated that local school boards are in the best position to determine if their students should be required to submit to random drug testing as a condition of participating in extracurricular activities.[72]

[71]*Earls*, 242 F.3d at 1278.

[72]On October 7, 1999, the OSSBA sent a survey to all of its member school districts seeking to gauge the degree of interest of Oklahoma's

Leaving such discretion to the educators and administrators will not require courts to intervene on a school-by-school and subgroup-by-subgroup basis as seems to be taking place at the present time. The record shows that Tecumseh considered factors such as the cultural and social atmosphere surrounding the students, students openly exhibiting an attitude of approval of illegal drug use, and the community's strong concern about the issue voiced through pleas from Tecumseh parents and community for the school district to do something about the student drug abuse problem.[73] In adopting the policy in question, the Tecumseh school board was merely doing what it believed was in the best interest of the students, as confirmed by many of the community members responsible for electing them to the school board. They were seeking to ensure a safe learning atmosphere where the education of the students would not be clouded by the existence of student substance abuse.

Requiring that a specific drug problem exist before a school can implement a drug testing program is also inconsistent with the goal of *deterrence.*[74] In *Vernonia*, the Court went to great lengths

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public schools in the issue of student drug testing. Of the more than 500 surveys sent out, more than 300 responses were returned. The results showed that a number of school districts had already adopted some type of student drug testing policy. Of those schools that did not have a student drug testing policy in place, the majority of the responding school districts stated the reason was based on "unclear legal issues," and stated that they would be likely to adopt a student drug testing policy if those legal issues were clarified. On the other hand, nearly one-third of those schools that did not have a student drug testing policy in place responded that they did not see the need to adopt such a policy in their respective school district. This split clearly shows that so long as the law is clear on this issue, local school officials are more than capable than appellate judges of determining whether or not to adopt a student drug testing policy in their districts.

[73] *Earls v. Board of Education of Tecumseh Public Sch. Dist.*, 115 F.Supp.2d 1281, 1285-86 (W.D. Okl. 2000).

[74] *See, e.g., Miller*, 172 F.3d 580 (holding that the court did not believe that the lack of an immediate drug crisis "must necessarily push the Cave

to discuss the addictive dangers of drug use and called deterrence of that use important and even compelling.[75] To then say that a school must wait until the use begins to occur – and apparently until it reaches fairly high levels - makes little sense:

> We see no reason that a school district should be compelled to wait until there is a demonstrable problem with substance abuse among its own students before the district is constitutionally permitted to take measures that will help protect its schools against the sort of "rebellion" proven in *Vernonia*....[76]

The *Vernonia* Court acknowledged that waiting to catch students in the act of drug use - in other words, a program of suspicion-based drug testing - would be "impracticable" on numerous grounds.[77] As noted in *Miller*, drug testing students involved in extracurricular activities serves to deter drug use generally in the school. Tecumseh has stated that its intent in limiting its drug testing program to those engaged in extracurricular activities was not based on the premise that drug use in this portion of the student body was more prevalent, but rather that this group was chosen "in an effort to deter and hopefully eliminate drug abuse by the large part of the student population."[78] Participation in extracurricular

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City policy into unconstitutional territory, as it does not mean that the need for deterrence is not imperative.").

[75] *Vernonia*, 515 U.S. at 661.

[76] *Miller*, 172 F.3d at 581.

[77] *Id.* In rejecting the argument that drug testing based on reasonable suspicion would suffice to combat the problem, the Court refused to force school districts to turn their teachers into drug investigators, noting that "[i]n many respects, we think testing based on 'suspicion' of drug use would not be better, but worse." *Vernonia*, 515 U.S. at 664. Requiring teachers to make untrained decisions as to who has been and who has not been using drugs can lead to claims of discrimination and arbitrariness.

[78] Petitioners Cert. Brief at 6.

activities has been shown to be linked to lower drug use itself.[79] Requiring a school district to wait until it can prove serious drug use among the students to be tested to begin the testing shifts the purpose of testing from deterrence to punishment.

The inherent arbitrariness of allowing courts to determine on a case-by-case basis when drug use is "serious" enough to warrant drug testing for the purposes of deterrence is highlighted in the recent case of *Gardner v. Tulia Indep. Sch. Dist.*[80] It involves a student drug testing policy virtually identical to that of Tecumseh. Tulia ISD presented the court with a survey conducted by the Texas Commission on Alcohol and Drug Abuse ("TCADA") that showed that 27 percent of Tulia ISD students self-reported using illegal drugs, and 10 percent reported attending school "stoned."[81] In declaring the Tulia ISD policy unconstitutional, the district court ignored the TCADA survey and concluded, "no major or widespread drug problem existed within any segment of the Tulia student body."[82] The court went on to state that the schools did not have an "above-average problem with drug use by students."[83] In fact the 27 percent usage rate among Tulia students was one percentage point below the 28 percent statewide average reported in the TCADA survey.

Must a school district wait until its number of student drug-users surpasses the state average to start deterring that use? If Texas had a 28 percent student drug use rate, but Arkansas only

[79] *E.g. Nicholas Zill, et al.,Adolescent Time Use, Risky Behavior and Outcomes: An Analysis of National Data*, U.S. Department of Health & Human Services (1995).

[80] 2000 U.S. Dist. LEXIS 20253 (N.D. Tex 2000); *appeal docketed*, No. 00-11404 (5th Cir. Dec. 20, 2001).

[81] *See* Brief of the Appellants (on record with the Fifth Circuit Court of Appeals).

[82] *Gardner v. Tulia Indep. Sch. Dist*, 2000 U.S. Dist. LEXIS 20253, 5 (N.D. Tex. 2000).

[83] *Id.* at 5-6.

had a 26 percent student drug use rate, could a school district where 27 percent of the students use drugs test if it is located in Texarkana, Arkansas, but not if it is located in Texarkana, Texas? If Tulia ISD had been one percentage point above the state average (and therefore, presumably, able to test its students), but a new wave of imported drugs into Houston, Dallas, San Antonio and Austin drives the state average up, does that mean that Tulia ISD would have to stop testing until it catches up to the state average? These examples may seem far-fetched or even silly; but so is ruling that a school district where over one-fourth of the students admit to using drugs and 1 in 10 students have sat stoned in a classroom does not have a drug problem. As this Court noted over 15 years ago, "drug use and violent crime in the schools have become major social problems."[84] When the goal of a school is to deter student drug use, the current amount of actual use should be irrelevant.

One of the *Earls* majority's criticisms of the Tecumseh policy is that it constituted an ineffective means of achieving the goal of drug deterrence, because the policy only tested a select group of students (those who choose to participate in extracurricular activities) and did not test all students.[85] However, merely because a school chooses to take an intermediate step in dealing with a problem, rather than the "all or nothing" approach that the *Earls* majority seems to advocate, does not necessarily mean that the program is arbitrary or unconstitutional:

> The Legislature is free to recognize degrees of harm and it may confine its restrictions to those classes of cases where the need is deemed to be the clearest. If the law

[84] *T.L.O.*, 469 U.S. at 339.

[85] *See, e.g., Earls*, 242 F.3d at 1277 & n.12 ("In essence, [the policy] too often simply tests the wrong students."). However, some courts have noted that at least in some school districts, a program that tested students participating in all extracurricular activities would reach a majority of the student body. For example, in Rush County, 77 percent of the student body was subject to the drug-testing program upheld by the court. *Todd v. Rush County Schs.*, 133 F.3d 984, 985 (7th Cir. 1998).

> presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied. There is no doctrinaire requirement that the legislation should be couched in all embracing terms.[86]

Testing students who participate in extracurricular activities for illegal drug use on a random, suspicionless basis is a reasonable and rational first step on the road to deterrence.

While the *Earls* majority seemed to question the efficacy of random drug testing, recent research indicates that suspicionless drug testing is in fact a very effective method of reducing student drug use. Researchers from the Oregon Health and Science University recently reported on a study designed to determine the efficacy of student athlete drug testing. After comparing drug use in schools that did drug test athletes with schools that did not, the researchers concluded that there was greater drug use in the control school, i.e. the school which did *not* drug test. "Drug testing may significantly reduce drug use among adolescent athletes."[87] Dr. Goldberg's results simply reflect common sense: suspicionless drug testing is effective because not only do students fear apprehension, but also the policy gives students an obvious and instantly accepted reason to "Just Say No". Thus, contrary to the Tenth Circuit's opinion in *Earls*, drug testing a group of students is, in fact, a very effective method of addressing student drug use.

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[86] *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 400 (1937). *See also McDonald v. Board of Election Commissioners of Chicago*, 394 U.S. 802, 809 (1969); *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483, 489 (1955).

[87] L. Goldberg, M.D., *"Drug Testing Adolescent Athletes: Does it Reduce Drug Usage? Results of a Prospective Randomized Trial*, Journal of Medicine in Sport and Exercise 2001, 35:5 (2001).

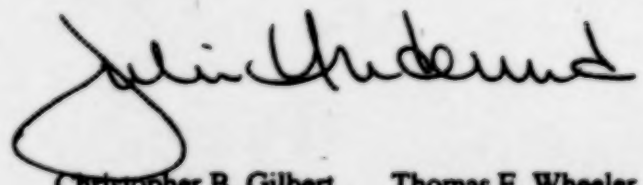
CONCLUSION

In its concise closing, the *Vernonia* Court summed up its holding as follows:

> Taking into account all the facts we have considered above -- the decreased expectation of privacy, the relative unobtrusiveness of the search, and the severity of the need met by the search -- we conclude Vernonia's policy is reasonable and hence constitutional.[88]

Where the goal is deterrence (not punishment), and the "most significant element" of the policy is that it is "undertaken in furtherance of the government's responsibilities, under a public school system, as guardian and tutor of children entrusted to its care,"[89] a program that allows schools to test students who volunteer for extracurricular activities for illegal drug use on a random and suspicionless basis is reasonable and, hence, constitutional.

Respectfully submitted,



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[88] *Vernonia*, 515 U.S. at 664.

[89] *Id.* at 665.